The second part of this is startling enough. The notion that every wife has a right to keep house is one of which the general recognition would work a revolution in the domestic history of the race. Its effect on life in New York city, for instance, is rather hard to conceive. However, there is less ground for panic than one thinks at first, for the Vice-Chancellor's words are less sweeping than those of the maker of the head-note. "The correspondence shows that all Mrs. Shinn desired was a home in which she could be mistress. This every wife is entitled to." Mr. Shinn, however, "insisted upon the condition that she must either come back to him and live with him as a boarder, in the home of another," or in the shanty above referred to. There is nothing here to show that a suite in a Fifth Avenue boarding-house, where the landlady was no relative of the husband, might not have been a home over which the wife could satisfactorily preside as mistress. Still, the language is absurd enough, and the court does not mention an authority in the whole case. Surely none could be found for the proposition that the single fact that the husband forced his wife to "live with him as a boarder in the house of another" is ground for separate maintenance. Very possibly there may be facts in the case making the decree justifiable; but the language of the court, and still more that of the maker of the head-note, needs revision.

RECENT CASES.

AGENCY — ASSAULT ON SEAMAN BY CAPTAIN. — The owners of a vessel are not liable, even under the maritime law, for a wilful and malicious assault by the captain of the vessel on a seaman who refuses to obey a command on the plea of sickness; since, in committing the assault, he exceeds his authority. His command does not extend over the persons of the seamen beyond the infliction of usual and necessary punishment in case of disobedience or infraction of rules. 14 N. Y. Supp. 125, and 15 N. Y. Supp. 976, reversed. Maynard, Finch, and O'Brien, JJ., *dissent.* *Gabrielson* v. *Waydell et al.*, 31 N. E. Rep. 969 (N. Y.).

AGENCY — CONFUSION OF GOODS — PRINCIPAL AS PREFERRED CREDITOR. — *Held*, reversing the decision of the lower court, that when money of A, the principal, is mingled with that of B, the fiduciary, and A cannot identify his property in some form, mere enrichment of B's estate does not entitle A to be made a preferred creditor. *Northern Dakota Elevator Co.* v. *Clark*, 53 N. W. R. 175 (N. D.).

The case and the language of the court seem wrong. For if A, who trusted, not to B's solvency, but to his honor, can prove the fund for distribution is larger because of B's misappropriation, there is no reason why the general creditors should get the benefit of it at A's expense. Cf. *Peak* v. *Ellicott*, 30 Kan. 156; *Harrison* v. *Smith*, 83 Mo. 210; *Bowers* v. *Evans*, 71 Wis. 133.

CARRIERS — LIABILITY AS WAREHOUSEMEN — PROXIMATE CAUSE. — Goods transported by defendant, a common carrier, were placed in its depot on arriving at their destination. The consignee inquired for them on the following day but was told they had not arrived. While in the depot they were destroyed by fire. *Held*, that the company was liable for the value of the goods, as it was owing to its negligence in not delivering them, when demanded, that they were there to be destroyed. *East Tennessee, V. & G. Ry. Co.* v. *Kelly*, 20 S. W. Rep. 312 (Tenn.).

Compare 54 N. Y. 500, and 13 Gray 481. The latter case, representing the weight of authority, held that the defendant was not liable on facts similar to the above.

CONSTITUTIONAL LAW — APPORTIONMENT OF STATE INTO LEGISLATIVE DISTRICTS. — The Constitution of New York provides that, on a legislative apportionment, "each senate district shall contain, as nearly as may be, an equal number of inhabitants, . . . and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a senatorial district except such county shall be

equitably entitled to two or more senators;" and that "the members of the Assembly shall be apportioned among the several counties of the State by the Legislature, as nearly as may be, according to the number of their respective inhabitants." *Held*, that these provisions do not require a mathematical accuracy, but vest in the Legislature a discretion with which the courts cannot interfere, unless it is plainly and grossly abused. It must be recognized that some inequalities are unavoidable, because of the compromises necessary to legislative action. Andrews and Finch, JJ., *dissent*. *People* ex rel. *Carter* v. *Rice*, 31 N. E. Rep. 921 (N. Y.).

Compare the recent cases in Wisconsin and Michigan, in which a contrary result was reached. *State* v. *Cunningham*, 51 N. W. Rep. 724; *State* ex. rel. *Lamb* v. *Cunningham*, 53 N. W. Rep. 35; *Giddings* v. *Blacker*, 52 N. W. Rep. 944; *Supervisors of Houghton County* v. *Blacker*, 52 N. W. Rep. 950.

CONSTITUTIONAL LAW — POLICE POWER. — The Legislature of West Virginia passed an Act, called the "Scrip Act," prohibiting any corporation, company, firm, or person engaged in any trade or business from paying their workmen by drafts redeemable otherwise than in lawful money. The Legislature also passed the "Screen Act," which provided that all coal mined shall be weighed before passing through a screen, and that mining companies shall pay their workmen on this basis. *Held*, by an evenly divided court, affirming the judgment appealed from, that mining is a business of great public importance, which the State has taken under its general supervision. The Legislature has granted extraordinary privileges to mining companies, and it is competent for it also to regulate that business for the public welfare. The public welfare demands that laborers should not be defrauded. The "Screen Act" is constitutional because it was intended to prevent fraud in the manner of weighing coal. The "Scrip Act" is constitutional because it was intended to prevent workmen being compelled to take drafts on a store for goods which might be there given to them at exorbitant prices. As these Acts were reasonably intended to bring about a result which it was within the power of the Legislature to accomplish, they cannot be declared unconstitutional simply because the court deems them inexpedient. *Peel Splint Coal Co.* v. *State*, 15 S. E. Rep. 1000 (W. Va.).

English and Brannon, JJ., *dissenting*, held that mining companies were on the same footing as private individuals, that the screen had been introduced in order to separate the worthless dust from the valuable blocks of coal, and to provide for payment before screening, was to compel the company to accept coal which was worthless: this was taking the company's property without compensation, and therefore the Act was unconstitutional. The "Scrip Act" was unconstitutional because it discriminated between persons engaged in business and those employing laborers for their own benefit.

CONSTITUTIONAL LAW — STATE JURISDICTION OVER PLACES CEDED TO THE UNITED STATES. — The State of New York ceded to the United States its jurisdiction over lands belonging to the United States and used for a navy-yard. The United States leased part of the land to the city of Brooklyn for a market, and the city subleased to the plaintiff. It was held that the State courts had jurisdiction of an action for trespass committed upon the land. *Barrett* v. *Palmer*, 31 N. E. Rep. 1017 (N. Y.).

State courts have no jurisdiction over places which the United States has purchased with the consent of the State Legislature for the erection of forts or other needful buildings. *Commonwealth* v. *Clary*, 8 Mass. 72. In *Chicago, etc. R. R. Co.* v. *McGlinn*, 114 U. S. 542, it was *held*, that where the United States had acquired land in any other way than by purchase with the consent of the State Legislature, its jurisdiction over parts not in use for government purposes was subject to such reservations as the State in its grant of jurisdiction chose to make. This case goes farther, and holds that though there is no express reservation of State jurisdiction, a cession by a State of its jurisdiction to the United States, over property which the United States already owns, reserves a concurrent jurisdiction in the State, at least until Congress provides for the exercise of federal jurisdiction there. It is submitted that this is without warrant of authority, and contrary to the natural meaning of the words of cession.

CONTRACT — DISSOLUTION OF CORPORATION — IMPOSSIBILITY OF PERFORMANCE. — Prior to the formation of a corporation by plaintiff and defendants, they entered into an independent agreement that defendants should have the management of the corporation, and should guarantee to plaintiff specified dividends on his stock for seven years. Five years after the formation of the corporation plaintiff procured a dissolution of the corporation by action in the name of the people, in which he was joined. *Held*, that the plaintiff might recover on the contract for dividends accruing after the dissolution of the corporation. *Lorillard* v. *Clyde*, 20 N. Y. Supp. 433.

Adopting the construction of the court, that defendant's promise was an absolute

one and did not depend on the continuance of the consideration, *i. e.*, his management of the business, the case is clear. The court, however, for the purposes of arguments admit the supposition that the action of the State in dissolving the corporation interfered with defendant's performance of his side of the contract, and say that even then the defendant is not released, as the impossibility of performance was brought about by an act of the State which was the direct result of his own misconduct. This point was not decided in the case of *People* v. *Globe Ins. Co.*, 91 N. Y. 174, but was suggested in the argument of plaintiff's counsel, and the remarks of the court in this case show the probability of the adoption of a general rule, that a corporation is not released from its contracts by a dissolution by act of the State, when such dissolution was brought about by its own acts of negligence or misconduct.

CORPORATIONS — POWER OF EQUITY TO WIND UP. — L, owning a majority of stock of a corporation, made himself director with two others who held stock in trust for him, and controlled the corporation for his own interest and profit. No dividend had been paid for seven years, and during this time the complainant stockholder had had three thousand dollars tied up in the corporation. *Held*, that equity had power to grant relief, to compel L to account, and to wind up the corporation. *Miner* v. *Belle Isle Ice Co.*, 43 N. W. R. 218 (Mich.).

CORPORATIONS — REORGANIZATION UNDER LAWS OF A FOREIGN STATE. — The trustees of a mining company incorporated in New York transferred all its property to a corporation organized at the time under the laws of California for the purpose of carrying on the business heretofore conducted by the New York company. The sole consideration for the conveyance was an agreement by the California company to pay the debts of the New York company and to issue to it certain shares of capital stock. The holders of a majority of the stock approved the transfer. *Held*, that the trustees must make restitution to the New York company; for, since a corporation cannot be destroyed by its own act, it cannot sell its property to a foreign corporation organized through its procurement for the express purpose of stepping into its shoes, taking its assets, and carrying on its business. *People* v. *Ballard*, 32 N. E. Rep. 54 (N. Y.).

CRIMINAL LAW — INSANITY — IRRESISTIBLE IMPULSE. — Defendant, indicted for murder, set up the defence of insanity. The judge in the lower court told the jury that, even though defendant knew the act was wrong, if his will power was so weakened by disease as to render him incapable of controlling his acts, he must be acquitted. This instruction was held erroneous in the upper court, on the ground that the only test of insanity is whether the defendant at the time of committing the act knew the difference between right and wrong, and knew that his act was wrong. *State* v. *Harrison*, 15 S. E. Rep. 982 (W. Va.).

The case adopts the English rule as settled by *McNaghten's Case*, 10 Cl. & F. 200, which has been followed in many jurisdictions in this country. For the opposite view, see a very able opinion of Somerville, J., in *Parsons* v. *State*, 81 Ala. 577.

The convenience of the rule laid down in the principal case as a test for the jury is apparent, as it obviates the necessity of considering the difficult question whether the "irresistible impulse" was the result of disease or not. But it is submitted that under this rule many persons may be held guilty who are impelled to do the act by a power which they cannot resist, who therefore are not responsible for their acts, and should be exempt from punishment. This position is taken by writers on insanity (see Encyc. Brit., article Insanity), and all medical authorities agree that there are many cases where the person understands perfectly the nature of his act, and yet is driven on by an impulse which he cannot control. 1 Bish. Crim. Law (7th ed.), § 387.

DAMAGES — MENTAL SUFFERING. — A telegram addressed to plaintiff was negligently delayed and delivered too late to enable him to be at the bed-side of a dying brother. *Semble*, that plaintiff could not recover damages for the mental suffering occasioned thereby. *Chapman* v. *W. U. Tel. Co.*, 15 S. E. Rep. 901 (Ga.). See above p. 260.

ELECTIONS — REJECTED BALLOTS. — Ballots which have been rejected without the statement of the cause of rejection which the statute requires the officers of election to make, must still be counted in making up the whole number of ballots cast, in order to determine whether any candidate had a majority for a particular office, though there is nothing to show for whom they were cast, or whether they were cast for any candidate for that office. *State* ex rel. *Phelan* v. *Walsh*, 25 Atl. Rep. 1 (Conn.).

EVIDENCE — DECLARATIONS OF DECEASED SHOWING STATE OF MIND OR INTENTION. — In an action upon a policy of insurance, the defendant introduced evidence tending to show that a dead body, found at a certain place, which plaintiff claimed was that of the insured, was in fact that of one W., and offered in evidence letters written

by W. to his family, in which he stated his intention of going to the place where the body was found. The evidence was excluded, and defendant excepted. *Held*, that such letters were competent evidence, not as proof that the writer actually went to a certain place, but that shortly before the time when, as other evidence tended to show, he did go, he had an intention so to do. Such letters were not competent as memoranda made in the course of business. *Mut. Life Ins. Co.* v. *Hillmon*, 12 Sup. Ct. Rep. 909.

EVIDENCE — DECLARATIONS OF DECEASED SHOWING STATE OF MIND OR INTENTION. — On a trial for murder of a woman, the defence was that the deceased had committed suicide. The circumstances not being consistent with this theory, the testimony of a trance medium was offered, to the effect that deceased called upon her the day before her death, and stated that she was five months pregnant with child, and asked what she should do, and later in the interview said she was going to drown herself. The evidence was rejected. *Held*, that such evidence was admissible to show the state of mind of deceased, and was not too remote in time, as the conditions had not changed from the time of the declaration to the time of death so as to make the declaration inapplicable. *Commonwealth* v. *Felch*, 132 Mass. 22, *overruled; Commonwealth* v. *Trefethen*, 31 N. E. R. 966 (Mass.).

This decision and the one before, in two courts of such high authority would seem to establish this exception to the hearsay rule upon a sound and satisfactory basis.

INSURANCE — CONDITION AGAINST RE-INSURANCE. — Plaintiff insured in a company whose policy contained a condition avoiding it if the assured should obtain other insurance without the consent of the company; he subsequently took out a policy on the same property in another company. *Held*, that the fact that the second policy also contained a clause providing that the existence of other insurance should render it void, and that the insured failed to notify the second insurer of the existence of the first policy, will not render the first insurer liable on the theory that the second policy was wholly void, and hence not a violation of the condition in the first; since by obtaining a second policy valid on its face, without giving notice to the first insurer, the insured has defeated the purpose of the condition. *Replogle* v. *American Ins. Co.*, 31 N. E. Rep. 947 (Ind.).

This is contrary to the rule as laid down in 2 May on Insurance, § 365, and supported by cases there collected; but it is submitted that the decision of the present case is right on principle, as it is certainly within the purpose of the general rule against other insurance. If the property owner *thinks* the second policy is good, and intends it to be good, the danger of his burning his building to get the insurance is the same as if the policy were really good. The point is well discussed, and authorities collected, in *American Insurance Co.* v. *Replogle*, 114 Ind. 1.

INSURANCE — INSANITY OF ASSURED. — An insane person who sets fire to the property insured does not have such a wrongful design as to give the company a good defence to an action on the policy. *D'Autremont* v. *Fire Asso. of Phila.*, 20 N. Y. Supp. 344.

This case illustrates the New York doctrine as first put forth in *Breasted* v. *Farmers' Ins. Co.*, 4 Hill, 73. As the case is one of absolute dementia, there is no room for the discussion of the mental phenomena which frequently involve these cases in psychological difficulties.

MASTER AND SERVANT — OBEDIENCE TO ORDERS — ASSUMPTION OF RISK. — A seaman, who was subject by statute to imprisonment and forfeiture of wages for disobedience of orders, was commanded by his superior officer, while the ship was in port, to operate an uncovered winch. The jury found that the seaman knew that the winch could not be operated without risk of danger to himself; that he operated it because he knew disobedience would result in his punishment; that notwithstanding his exercise of reasonable care, he was injured because of the known defects of construction in the winch. *Held*, that whether the order to operate the uncovered winch was lawful or unlawful, the finding of the jury, that there was no negligence on the part of the seaman in obeying, will not be reversed on appeal; also, that the seaman can recover from the vessel-owners, in view of the peculiarly difficult position in which he was placed. *Eldridge* v. *Atlas Steamship Co.*, 32 N. E. Rep. 66 (N. Y.).

On the findings of the jury this decision must be regarded as sound, but the dissenting opinion is entitled to careful consideration, and it might be well to add to it an examination of the following cases: 18 Q. B. D. 685; 14 App. Cas. 179; 63 N. Y. 448; 2 Ex. Div. 384; 8 S. E. Rep. 311; 79 Me. 397; 9 Exch. 223; 9 Cush. 112; 43 Ia. 396; 3 M. & W. 1; 4 Metc. 49.

REAL PROPERTY — ADVERSE POSSESSION AGAINST THE PUBLIC. — In an action to enjoin defendants, officers of a town, from entering upon certain premises and tearing

down a building, plaintiff set up a title by adverse possession to the premises, which had formerly been used as a public street. *Held*, that no title against the public can be gained by adverse holding, but there must be such circumstances as to estop the public to claim title. *Crocker* v. *Collins*, 15 S. E. Rep. 95 (S. C.).

Althought this is a dictum, it is a considered one, and will probably establish the law for South Carolina which has been cited for the opposite view (Dillon, Municipal Corp. 4th ed. 674); the court here treated the South Carolina law as in doubt. The doctrine of this case is held in Pennsylvania and three other States, but is contrary to the weight of American authority (Dillon, *loc. cit.*).

REAL PROPERTY — CONDEMNATION OF PRIVATE WAY FOR STREET — DAMAGES. — When a private way is taken as a public street, the owners of the fee are entitled to nominal damages only. *Village of Orleau* v. *Steyner*, 32 N. E. Rep. 9 (N. Y.).

The court say that, deducting from the value of the public easement taken the value of the private easement which already incumbered the property, the injury is only nominal. It might be urged that the easement of a private way is more easily released, and is not necessarily so extensive. It would not, for example, include the right to operate a horse-railroad. In *Buffalo* v. *Pratt*, 131 N. Y. 297, the same court has held that if the fee of an existing public street be taken, substantial damages may be awarded.

REAL PROPERTY — DESCENT — TRACING TITLE THROUGH NON-RESIDENT ALIEN. — Under an Act prohibiting non-resident aliens from holding lands by descent, devise, or purchase, a resident whose father is a non-resident alien cannot inherit from his resident paternal uncle, since he would derive his title mediately through his father, and not immediately from his uncle. *Furenes* v. *Mickleson*, 53 N. W. R. 416 (Iowa).

REAL PROPERTY — EASEMENT — DIVERSION OF PERCOLATING WATER. — A conveyed to B land to which there was appurtenant the right to take water from a spring on A's adjoining land. A maliciously dug a well and ditch close to the spring, and thereby so diverted the percolating water as to make the spring useless to B. *Held*, that B could have specific reparation, for A's land became servient to B's to the extent apparently needed to sustain the grant. In any event, malice was immaterial. *Paine* v. *Chandler*, 32 N. E. Rep. 18 (N. Y.).

This decision virtually overrules *Bliss* v. *Greeley*, 45 N. Y. 671, which holds that a grant of an easement to use a spring can create no greater rights than a conveyance in fee of the soil of the spring. *Tybe's Appeal*, 106 Penn. St. 626, and *Chesley* v. *King*, 74 Me. 164, which follow *Bliss* v. *Greeley*, are not cited.

REAL PROPERTY — ELECTRIC RAILWAYS — ADDITIONAL SERVITUDE. — The use of a street by an electric railway with overhead wires and poles is not an additional servitude for which abutting owners can demand compensation. *Dean* v. *Ann Arbor Street Ry. Co.*, 53 N. W. Rep. 396 (Mich.).

The decisions on this point are conflicting. The New York rule, as a practical question, seems more logical. See 4 Harvard Law Review, 245.

REAL PROPERTY — ELEVATED RAILROAD — DAMAGES. — The owner of property can recover as past damages the diminution in rental value caused by an elevated railroad, although the structure did not interfere with the use to which the property was actually put by the owner. *Woolsey* v. *New York El. R. Co.*, 31 N. E. Rep. 891 (N. Y.).

It is the general rule that for a permanent injury to real estate the rule of damages is the diminution in market value. Sedgwick on Damages, 8th ed., § 947. Its application in this particular case allows a man to recover where he actually suffered nothing. This is similar to those cases which allow a reversioner to recover substantial damages for injuries done while a tenant is in possession. *Shadwell* v. *Hutchinson*, 2 Barn. & Ad. 97; *Jesser* v. *Gifford*, 44 Burr. 214.

WILLS — CONSTRUCTION — MISTAKE — EXTRINSIC EVIDENCE. — Testatrix, showing in her will intention to dispose of all her property, said that she was "owner of" and devised to plaintiff "the S. E. ¼ of section 14, township 98, range 17," in a certain county. She did not own the S. E. ¼, but did own the S. W. ¼. In construing the will, *held*, that the expressed intention was clear, and exactly described land in existence, and that the court could not refer to extrinsic facts to show an intent not expressed, and that if the words "S. E." were ignored, there did not remain a sufficient description to identify the lot devised with the S. W. ¼. *Eckford* v. *Eckford*, 53 N. W. Rep. 344 (Iowa).

The case seems right, and is very fully discussed on the cases and on the principles laid down in Wigram on Wills. The court decline to follow cases holding bare words of ownership to be sufficient description to carry land actually owned.